

IN THE MATTER OF :

West Platte R-II School District

Petitioner

and

,

Respondent

1. (“Student”) is the son of (“Parent”). Student was born on .
2. At all times material to this due process proceeding, Student resided with his Parents within the boundaries of the West Platte R-II School District (“District”).
3. At the November, 2004 hearing, the Student and Parent were represented by Rebecca J. Terry and Timothy R. West, Shook, Hardy & Bacon, L.L.P., 2555 Grand Blvd., Kansas City, MO 64108-2613. At the resumed hearing in February, 2005, the Student and Parent were represented by Kayden Howard and Elizabeth Lawrence, Shook, Hardy & Bacon, L.L.P., 2555 Grand Blvd., Kansas City, MO 64108-2613.
4. The District was represented at the hearing by Teri Goldman, Teri Goldman, LLC, 36 Four Seasons Center, #136, Chesterfield, MO 63017.
5. The District requested due process by letter to the Department of Elementary and Secondary Education (“DESE”) dated July 23, 2004 which was received by DESE that same day. (HP Exhs 1 and 2) The original deadline for mailing the decision in this matter was September 7, 2004. (HP Exh 6).
6. On August 6, 2004, the Hearing Chairperson sent the Parent’s Counsel a copy of the *Procedural Safeguards for Children and Parents*. (HP Exh 5).
7. On August 8, 2004, the District requested an extension of the time lines through November 30, 2004. (HP Exh 7). The Hearing Chairperson extended the time lines to November 30, 2004 by letter dated August 6, 2004. (HP Exh 8).

8. On August 26, 2004, the Hearing Chairperson issued a Notice of Hearing, setting the hearing for November 3, 4 and 5, 2004. (HP Exh 9).
9. On November 3, 4 and 5, 2004, a hearing in this matter was held in Weston, Missouri, with all parties in attendance. The hearing was not completed during these three days and the record was left open.
10. On November 23, 2004, the Parent requested an extension of the time lines through January 31, 2005. (HP Exh 33). The Hearing Chairperson extended the time lines to January 31, 2005 by letter dated November 24, 2004. (HP Exh 34).
11. On December 3, 2004, the District requested an extension of the time lines through March 31, 2005. (HP Exh 36). The Hearing Chairperson extended the time lines to March 31, 2005 by letter dated December 3, 2004. (HP Exh 37).
12. On December 6, 2004, the Hearing Chairperson issued an Notice of Resumed Hearing which set the dates for the resumed hearing for February 9-10, 2005. (HP Exh 38).
13. The resumed hearing in this matter began on February 9, 2005 and was concluded on February 10, 2005, in Weston, Missouri.
14. The Hearing Chairperson for the hearing was Ransom Ellis, III. The Hearing Panel Members during the November 3-5, 2004, hearing were Dr. Patty Smith and Dayna Deck. The Hearing Panel Members during the February 9-10, 2005 hearing were Dr. Patty Smith and Marilyn McClure and Hearing Chairperson Ransom Ellis, III..

**BEFORE THE HEARING PANEL
EMPOWERED BY THE
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

IN THE MATTER OF :)
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West Platte R-II School District)
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 Petitioner)
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and)
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,)
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 Respondent)

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
DECISION AND ORDER**

The Hearing Panel, after conducting the due process hearing in this matter on November 3-5, 2004 and February 9-10, 2005, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

I. FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

A. The Parties

1. (“Student”) attends school in the West Platte R-II School District (“District”). At all times relevant to this due process proceeding, the Student has lived with his Mother who resides within the boundaries of the District. The primary mode of communication of the Student and Mother is written and spoken English.
2. The District is a Missouri Public School District which is organized pursuant to Missouri statutes. During school year 2003-2004 the District operated out of one educational building which housed all of its educational programs. During that school year, the District had an enrollment of slightly over six hundred (600) students. (*Missouri School Directory 2004-2005.*)
3. At the November, 2004 hearing, the Student and Parent were represented by Rebecca J. Terry and Timothy R. West, Shook, Hardy & Bacon, L.L.P., 2555 Grand Blvd., Kansas City, MO 64108-2613. At the resumed hearing in February, 2005, the Student and Parent were

represented by Kayden Howard and Elizabeth Lawrence, Shook, Hardy & Bacon, L.L.P., 2555 Grand Blvd., Kansas City, MO 64108-2613.

4. The District was represented by Teri Goldman, Teri Goldman, LLC, 36 Four Seasons Center, #337, Chesterfield, MO 63017.

5. The Hearing Panel for the due process proceeding was:

Ransom A Ellis, III	Hearing Chairperson
Dr. Patty Smith	Panel Member
Ms. Dayna Deck	Panel Member (November, 2004 hearing only)
Ms. Marilyn McClure	Panel Member (February, 2005 hearing and decision only)

Panel Member Deck did not participate in the deliberations or preparation of these Findings of Fact, Conclusions of Law, Decision and Order.

6. During all times relevant to this proceeding the following persons were employed by the District and have provided educational services to the Student:

Kyle Stephenson	Superintendent
LeeAnn Rick	Director of Special Education
Dave Waddell	Elementary Principal
Stan Coulson	High School Principal
Tanya Adams	Special Education Teacher
Shari Hart	Special Education Teacher
Rita Pospisil	Special Education Teacher
Lori Russell	Special Education Teacher
Charles Yaw	Special Education Teacher
Bev McCormick	Elementary Classroom Teacher
Patti Ruben	Elementary Classroom Teacher
Molly Tanner	Secondary Classroom Teacher
Janel Coulson	Secondary Classroom Teacher
Angie Harmon	Occupational Therapist
Becky Greble	Occupational Therapist
Dana O'Toole	Speech Language Pathologist

B. Procedural Background

7. The District requested due process by letter to the Department of Elementary and Secondary Education ("DESE") dated July 23, 2004 which was received by DESE that same day. (HP Exhs 1 and 2). The original deadline for mailing the decision in this matter was September 7, 2004. (HP Exh 6).

8. On or about August 2, 2004 Ms. Pam Williams notified the Hearing Chairperson (HP Exh 3) and the Hearing Panel Members (HP Exh 4) that they had been selected to serve on the hearing panel for the request for due process filed by the District.
9. On August 6, 2004, the Hearing Chairperson sent the Parent's Counsel a copy of the *Procedural Safeguards for Children and Parents*. (HP Exh 5). The Hearing Chairperson also notified the parties that the due process hearing had to be held, and a written decision rendered by, September 7, 2004. (HP Exh 6).
10. On August 8, 2004, the District requested an extension of the time lines through November 30, 2004. (HP Exh 7). The Hearing Chairperson extended the time lines to November 30, 2004 by letter dated August 6, 2004. (HP Exh 8).
11. On August 26, 2004, the Hearing Chairperson issued a Notice of Hearing, setting the hearing for November 3, 4 and 5, 2004. (HP Exh 9).
12. On or around August 26, 2004, Parent's Counsel, Rebecca Terry was replaced by AdoLisa Anardo.
13. On August 31, 2004, the Parent filed a Motion to Dismiss the District's Request for Due Process. (HP Exh 10). On September 9, 2004, the District filed an Opposition to the Parent's Motion to Dismiss. (HP Exh 11). On September 14, 2004, the Parent filed an Amendment to Motion to Dismiss. (HP Exh 15). On September 23, 2004, the Hearing Chairperson issued a Decision and Order Regarding Respondent's Motion to Dismiss which denied the motion. (HP Exh 16).
14. On September 9, 2004, the District filed a Motion to Compel Evaluation, which sought to obtain an order requiring the evaluation of the Student. (HP Exh 12). On September 24, 2004, the Parent filed Respondent's Opposition To Petitioner's Motion To Compel Evaluation. (HP Exh 18). On September 29, 2004, the District filed Petitioner's Reply Suggestions In Support of Its Motion To Compel Evaluation. (HP Exh 21). On October 1, 2004, the Hearing Chairperson issued a Decision and Order Regarding Petitioner's Motion to Compel Evaluation which granted the District's Motion to Compel Evaluation. (HP Exh 22). On October 7, 2004, the Hearing Chairperson issued a Supplemental Decision and Order Regarding Petitioner's Motion to Compel Evaluation, which modified the previous Decision and Order. (HP Exh 24). On October 17, 2004, the District filed Petitioner's Motion to Vacate, which requested that the Orders issued by the Hearing Panel, dated October 1 and 7, 2004, which compelled the evaluation of the Student, be vacated. (HP Exh 26). On October 18, 2004, the Hearing Chairperson issued an Order Vacating Hearing Panel's Order Directing Evaluation of Student, which vacated the Hearing Panel's Orders dated October 1, 2004 and October 7, 2004. (HP Exh 27).

15. On October 3, 2004, the District filed Petitioner's Motion to Recuse Hearing Officer Deck. (HP Exh 23). On October 8, 2004, the Hearing Chairperson issued a Decision and Order Regarding Petitioner's Motion to Recuse Hearing Officer Deck, which denied the motion to recuse. (HP Exh 25).
16. On or about October 20, 2004, the Parent's Counsel, AdoLisa Anardo was replaced by Rebecca Terry and Tim West.
17. On October 20, 2004, the Parent filed Respondent's First Request for Production of Documents to West Platte R-II School District. (HP Exh 28). This matter was taken up during a pre-hearing telephone conversation between the Hearing Chairperson and Counsel for the parties which was held on October 21, 2004 and resolved at that time.
18. On November 1, 2004, the Parent filed Respondent's Motion to Recuse Hearing Officer Smith. (HP Exhs 30 and 31). The Hearing Chairperson denied the Motion at the hearing on November 3, 2004. (Tr p. 6).
19. On November 2, 2004, the Parent filed Respondent's Motion in Limine. (HP Exh 32). The Hearing Chairperson denied this motion at the hearing on November 3, 2004. (Tr pp. 6-7).
20. On November 3, 4 and 5, 2004, a hearing in this matter was held in Weston, Missouri, with all parties in attendance. The hearing was not completed during these three days and the record was left open.
21. On November 23, 2004, the Parent requested an extension of the time lines through January 31, 2005. (HP Exh 33). The Hearing Chairperson extended the time lines to January 31, 2005 by letter dated November 24, 2004. (HP Exh 34).
22. On December 3, 2004, the District requested an extension of the time lines through March 31, 2005. (HP Exh 36). The Hearing Chairperson extended the time lines to March 31, 2005 by letter dated December 3, 2004. (HP Exh 37).
23. On December 6, 2004, the Hearing Chairperson issued an Notice of Resumed Hearing which set the dates for the resumed hearing for February 9-10, 2005. (HP Exh 38).
24. On December 6, 2004, the Hearing Chairperson issued an Order Removing Hearing Panel Member Deck. (HP Exh 40). This Order was issued after Panel Member Deck stated that she believed she was no longer impartial and could not continue as a member of the Hearing Panel. (HP Exh 39). The Order further directed the Parent to select a replacement Panel Member who would be available for the resumed hearing on February 9-10, 2005.
25. On December 15, 2004, the Parent's Counsel notified DESE that the Parent had selected Marilyn McClure to replace Dayna Deck on the Hearing Panel. (HP Exh 41).

26. On or around December 31, 2004, Marilyn McClure indicated to the Hearing Chairperson that she would not be available for the resumed hearing on February 9-10, 2005. (HP Exh 43). On December 31, 2004, the Parent's Counsel requested that the February hearing be continued to accommodate the schedule of Ms. McClure. (HP Exh 43). On January 7, 2005, the Hearing Chairperson issued a Decision and Order denying the Parent's request for a continuance of the February hearing and directed the Parent to find a replacement hearing panel member who could be available for the February hearing. (HP Exh 44). Subsequently, Ms. McClure indicated that she was able to attend the previously arranged February, 2005 hearing.

27. On January 25, 2005 the Parent's Counsel, Rebecca Terry and Tim West were replaced as Counsel by Kayden Howard and Elizabeth Lawrence. (HP Exh 56).

28. On or about February 3, 2005 the Parent filed Respondent's Second Motion to Dismiss. (HP Exh 45). On February 3, 2005 the Hearing Chairperson denied Respondent's Second Motion to Dismiss. (HP Exh 47).

29. On or about February 3, 2005 the Parent filed Respondent's Motion to Recuse Hearing Officers Ellis and Smith. (HP Exh 46). On February 3, 2005 the Hearing Chairperson denied Respondent's Motion in the Decision and Order regarding Respondent's Motion to Recuse Hearing Chairperson Ellis and Hearing Officer Smith. (HP Exh 48).

30. The resumed hearing in this matter began on February 9, 2005 and was concluded, and the record was closed on February 10, 2005, in Weston, Missouri.

31. During the initial hearing in November, 2004, and the resumed hearing in February, 2005, Exhibits were introduced and received into evidence at the hearing. The following documents were admitted and made a part of the record in this case: Hearing Panel Exhibits ("HP Exh") 1 through 32, (Tr pp. 6-8); Hearing Panel Exhibits 33 through 56, (Tr p. 492); the record and transcript from the first due process hearing between the parties, (Tr pp. 8-9); District Exhibits ("Dist Exh") 1 through 37, (Tr pp. 15-16); Respondent's Exhibits ("R Exh") 1, 2, 5, 7, 10-11, 13, 16-23, 27-28, 31, 35-37, 41-48, 50, 53, 57, 60-61, 63 and 67-69 (Tr pp. 646). Petitioner's Exhibits 1 through 37 were admitted as business records of the District. (Tr p. 16).

C. Time Line Information

32. The District requested due process by letter to the Department of Elementary and Secondary Education ("DESE") dated July 23, 2004 which was received by DESE that same day. (HP Exhs 1 and 2) The original deadline for mailing the decision in this matter was September 7, 2004. (HP Exh 6).

33. On August 8, 2004, the District requested an extension of the time lines through November 30, 2004. (HP Exh 7). The Hearing Chairperson extended the time lines to November 30, 2004 by letter dated August 6, 2004. (HP Exh 8).

34. On November 23, 2004, the Parent requested an extension of the time lines through January 31, 2005. (HP Exh 33). The Hearing Chairperson extended the time lines to January 31, 2005 by letter dated November 24, 2004. (HP Exh 34).

35. On December 3, 2004, the District requested an extension of the time lines through March 31, 2005. (HP Exh 36). The Hearing Chairperson extended the time lines to March 31, 2005 by letter dated December 3, 2004. (HP Exh 37).

D. The Issues

36. The following issues were presented to the Hearing Panel:

Issue No. 1: Whether the IEP developed for the Student on or about March 29, 2004, offers the Student a free, appropriate public education in the least restrictive environment and is reasonably calculated to provide educational benefit to the Student.

Issue No. 2: Whether the stay-put, which resulted from the Student's 2003 due process request, precluded the District from developing the March 29, 2004 IEP for the Student.

(Tr pp. 4-5).

E. Background Facts

37. The Student is educationally diagnosed as being Learning Disabled in the areas of Basic Reading Skills, Reading Comprehension, Math Calculation and Written Language. (Dist Exh 1, p. 2).

38. On April 2, 2003, the Student's Individualized Education Program ("IEP") team met in an annual meeting to develop the Student's IEP for the period beginning on April 14, 2003 through April, 14, 2004. (Dist Exh 1). Present at the meeting were the Student's Parents, LeeAnn Rick, Bev McCormick, Tanya Adams, Dana O'Toole, Shari Hart, Angie Harmon and Rand Hodgson, a Parent Advocate. (Dist Exh 1, p. 1). The Student's IEP team determined that the Student should receive special education and related services as follows: (a) six hundred sixty (660) minutes each week in a special education resource room; (b) two hundred (200) minutes per week beginning August 19, 2003 of resource math services in a special education resource room; (c) two hundred (200) minutes each week of class within a class in the regular and special education classrooms; (d) ninety (90) minutes each week of speech/language services in the regular and special education classrooms; and (e) thirty (30) minutes each week of occupational therapy in the special education classroom. (Dist Exh 1, p. 1). Under the Stay Put IEP the

Student was scheduled to receive seven hundred eighty (780) minutes each week of special education services outside the regular classroom and was scheduled to receive one thousand one hundred ninety-five (1,195) minutes each week of educational instruction in the regular education classroom. (Dist Exh 1, p. 1).

39. On July 9, 2003, the Parent filed a request for a due process hearing (“Original Request”) with DESE alleging among other things that the District had failed to provide the Student with a free, appropriate public education (“FAPE”) in the least restrictive environment and that the District had committed procedural violations of the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.* The filing of the Original Request made the Student’s April, 2003 IEP the “stay put” IEP. A due process hearing was held on October 28 through 31, 2003 and January 12 through 16, 2004 in Weston, Missouri. The hearing panel consisted of Kenneth M. Chakes (hearing chairperson), Dayna Deck (panel member) and Dr. Patty Smith (panel member) (“Original Hearing Panel”).

40. In August, 2003, the Student started the sixth grade. The elementary curriculum in the District is based on an educational week composed of one thousand nine hundred seventy-five (1,975) minutes. The April, 2003 IEP (“Stay Put IEP”) was the educational program provided by the District to the Student during his sixth grade year.

41. On March 5, 2004, the District provided the Parent with a written Notification of Meeting form which indicated that the Student’s annual IEP meeting had been scheduled for March 29, 2004. On that same day, LeeAnn Rick provided oral notice of the scheduled meeting to the Parent and the Parent indicated that she was available for the meeting on March 29, 2004. (Tr p 19). The written Notification was received by the Parent on March 9, 2004. (Dist Exh 2, pp. 34-36). On March 24, 2004, LeeAnn Rick left a voice mail for the Parent to reconfirm the March 29, 2004 IEP meeting date and sent a written confirmation letter to the Parent. (Dist Exh 5, pp. 61-62).

42. The District provided the Parent with two timely written notices for the IEP meeting which was scheduled for, and took place on March 29, 2004. (Tr p. 19; Dist Exhs 2, 4 and 5). The District personnel made a reasonable effort to convince the Parent to attend the March 29, 2004 IEP meeting. The District maintained sufficiently detailed records of the conversations and correspondence sent to the Parent and the responses they received.

43. On March 29, 2004, the Student’s IEP team met to develop an annual IEP for the Student. Present at the meeting were LeeAnn Rick, Molly Tanner, Shari Hart, Dana O’Toole, Becky Greble and the District’s Counsel, Teri Goldman. (Dist Exh 6, p. 63). The Student’s Parent did not attend the meeting. The Student’s Parent later told LeeAnn Rick that she was not at the meeting because her attorney told her not to attend the meeting. (Tr p. 19). The Mother testified at the hearing that she did not attend because she wanted to wait for the Original Hearing Panel to issue its decision. (Tr p. 573).

44. During the March 29, 2004 IEP meeting, the Student's IEP team determined that the Stay- Put IEP would remain in place through the end of the Student's sixth grade year (school year 2003-2004). (Dist Exh 6, p. 64).

45. The goals and objectives set forth in the March 29, 2004 IEP were designed to provide the Student with educational benefit. (Tr pp. 23-26, 41).

46. During the March 29, 2004 IEP meeting the Student's IEP was also planning for the Student's Seventh Grade year (school year 2004-2005). The District operates a Junior High School curriculum that has an educational week which is two hundred twenty-five (225) minutes shorter than the Elementary educational week (compare Dist Exh 1, p. 1, with Dist Exh 6, p. 63). Accordingly, the Student's IEP team determined that the minutes of special education and related services had to be adjusted to fit within the Junior High school day, beginning on August 19, 2004, the date of the Student's entry into the Junior High School program. The Student's IEP team determined that beginning on August 19, 2004, the Student would receive the following special education and related services: (a) two hundred fifty (250) minutes each week of specialized instruction in math delivered in the special education classroom; (b) two hundred fifty (250) minutes each week of specialized instruction in English delivered in the special education classroom; (c) two hundred twenty (220) minutes each week of specialized instruction in Study Strategies delivered in the special education classroom; and (d) thirty (30) minutes each week of occupational therapy, a related service, delivered in the special education classroom. (Dist Exh 6, p. 63). Under the March 29, 2004 IEP, the Student was scheduled to receive seven hundred fifty (750) minutes each week of special education services outside the regular education classroom and would receive instruction in the regular education classroom for one thousand (1,000) minutes each week. (Dist Exh 6, p. 63).

47. A copy of the Student's March 29, 2004 IEP was provided to the Parent by the District. (Tr pp. 27-28).

48. The March 29, 2004 IEP offered the Student the opportunity for extended school year services. (Dist Exh 6, p. 74). During the Summer of 2004, the District made arrangements to provide the extended school year ("ESY") services specified in the Student's IEP. The Student only attended the ESY program for one day. (Tr p. 28). The Parent testified that she accompanied the Student to the ESY program and decided not to send him back because she did not think that the District was using the multi-sensory teaching approach, although she was unable to describe what a multi-sensory teaching approach was. (Tr pp. 534-536). The Parent never mentioned this concern to the District. (Tr p.538). The Parent's decision not to send the Student for ESY services after one day of attendance adversely affected the Student's educational performance.

49. On March 29, 2004 the District issued the Parent a Notice of Action regarding the change of placement which was set forth in the March 29, 2004 IEP. (Dist Exh 7, p. 86; Tr p. 29).

50. On April 5, 2004 the Original Hearing Panel issued its decision on the Original Request (“Original Decision”) (Exhibit A attached to HP Exh 10). The Hearing Panel found that the District:

A. Violated the IDEA by failing to reevaluate the Student during his fourth grade year or at the beginning of his fifth grade year to determine whether he had a learning disability in math.

B. Failed to include an accurate statement of the Student’s present levels of educational performance in his April, 2002 IEP.

C. Failed to provide the Student with FAPE by failing to include appropriate goals and objectives in the area of math on the Student IEP for the fifth grade.

D. Failed to provide the Student with special education services in math until the beginning of his sixth grade year.

E. Failed to provide appropriate special education services to the Student in the area of reading during his fourth, fifth and part of his sixth grade years.

51. In the Original Decision, a majority of the Hearing Panel issued an Order which required the District to:

A. Provide compensatory education services for one year of special education in math.

B. Amend the Student’s IEP to incorporate the reading services that include a multi-disciplinary approach that utilizes: (1) all the sensory modalities all the time; (2) a structured, sequential teaching approach, to teach the Student the structure of the English language; (3) at least one hour per day of one-on-one instruction in decoding/phonics; and, (4) a teacher with special training and expertise in teaching a child with severe dyslexia.

C. Provide compensatory education services in reading, as described in subparagraph (B) above, for at least two hours each day for a duration of three years.

52. On May 10, 2004, the District filed a Complaint in the United States District Court for the Western District of Missouri styled *West Platte R-II School District v. [J.W.], by and on behalf of her son L.W.*, Case Number 04-6040-CV-SJ-ODS (“Federal Appeal”). The Federal Appeal constituted an appeal from the Original Decision and was brought pursuant to the IDEA.

53. On July 20, 2004, the Honorable Ortrie D. Smith, United States District Judge, issued an Order which granted the Parent's request for a preliminary injunction ("Injunction"). The injunction was as follows:

"(1) West Platte R-II School District is hereby preliminarily enjoined during the course of this action from violating the agreement executed by the State of Missouri and Defendant [J.W.];

(2) West Platte R-II School District shall implement the current educational placement as set forth in the April 5, 2004, DESE Due Process Hearing Panel's Decision;

(3) This Order shall remain in full force and effect until a trial on the merits or further order of this Court."

54. On July 23, 2004, the District requested the current due process hearing ("Current Request") by letter to DESE. (HP Exhs 1 and 2).

55. Following the filing of the Current Request, the Parent filed a Motion to enforce the Court's Preliminary Injunction and to find the District in Contempt as a result of the filing of the Current Request. On August 4, 2004, the Court denied the Parent's Motion stating that the Court's Order "did not prohibit the District from initiating any due process proceedings, and, thus, the District did not violate the preliminary injunction." The Court noted, however, that "the preliminary injunction remains in place, so any decision resulting from the due process proceeding cannot be implemented absent an order from the Court."

56. On August 9, 2004, the Student's IEP Team met to develop a schedule for the Student that would coincide with the requirements placed on the District by the Original Decision. (Tr p. 32). The Student's IEP team, including the Parent, prepared and agreed to a schedule and placement of the Student for his seventh grade year (school year 2004-2005) that they believed would comply with the Original Decision. (Tr pp. 31-32; P Exh 21). During this meeting, the Parent and District agreed that the Student would receive:

A. Physical Education instruction – Two hundred fifty (250) regular education minutes per week of Physical Education in class period 1 during the school day.

B. Special Education Reading Instruction – Two hundred fifty (250) special education minutes per week of Special Education Reading Instruction in class period 2 during the school day. This instruction would use a multi-disciplinary approach using all the senses all the time and using a structured, sequential approach to teaching language.

C. Special Education Study Strategies – Two hundred fifty (250) special education minutes per week of Special Education Study Strategies in class period 3 during the school day.

D. Special Education Math Instruction – Two hundred fifty (250) special education minutes per week of Special Education Math Instruction in class period 4 during the school day.

E. Class-Within-A-Class Science – Two hundred fifty (250) regular education minutes per week of Class Within A Class Science in class period 5 during the school day.

F. Special Education Math Instruction – Two hundred seventy (270) special education minutes per week of Special Education Math Instruction in class period 6 during the school day.

G. Class Within A Class Social Studies – The Student would receive two hundred fifty (250) regular education minutes per week of Class Within A Class Social Studies in class period 7 during the school day.

H. One-on-one Reading Instruction – One-on-one reading instruction from Rita Pospisil after school on Monday and Wednesday for one and one-half hours each day. (Tr pp. 33-34). Since making these arrangements, the Student has attended the reading sessions on two or three occasions. (Tr p. 33).

I. At the request of the Parent, all speech/language goals contained in the April 2003 IEP were omitted and at the beginning of school year 2004-2005, the Student's teachers were allowed to informally assess the Student's current levels in reading and math and use their professional judgment to determine whether to implement the goals and objectives in the April 2003 IEP, the goals and objectives in the March 29, 2004 IEP or a combination of the goals and objectives from the two IEPs.

J. The District offered to continue the ninety (90) minutes per week of speech/language therapy. The Parent requested that this related service be discontinued.

57. On August 19, 2004, the Student began his seventh grade year in the District's Junior High School. The Junior High curriculum in the District is based on an educational week composed of one thousand seven hundred fifty (1,750) minutes.

58. The Injunction issued by Judge Smith caused the District a number of problems connected with providing the Student with FAPE in the least restrictive environment. Specifically:

A. The Student is not in an English class because the educational time required by the Original Decision, as enforced by the Injunction, did not allow enough additional time for the Student to be enrolled in an English class. (Tr pp. 24-25);

B. The Student has had difficulty with certain research projects in his Science class, which required writing, because the English and Science teachers worked together on the research project. (Tr pp. 24-25);

C. The Student is not enrolled in a Study Strategies Class because there was not enough time left in the school day. (Tr pp. 25-26);

D. The Student is unable to take a physical education class. (Tr pp. 34-35);

E. The Student is unable to be enrolled in any of the “Wheel” classes, which are shop, family and consumer science and keyboarding because he receives the mandated math compensatory services during that time period. (Tr pp. 36-37).

59. On September 16, 2004 the Parent met with Stan Coulson, the District’s secondary principal, and requested that the District discontinue the Student’s compensatory services. Later that day, the Parent repeated this request to LeeAnn Rick. Ms. Rick indicated to the Parent that the District also felt that the compensatory services were not in the Student’s best interest but could not discontinue the services because they were mandated by the Original Decision and Injunction. Ms. Rick confirmed this conversation with a letter dated September 16, 2004. (P Exh 29, p. 226.). That same day the Parent sent a letter to Ms. Rick which stated that the Parent had decided to “temporarily discontinue” the Student’s participation in the after school compensatory services. (P Exh 29, p. 227). On September 20, 2004 Ms. Rick responded by letter to the Parent and indicated that the District would continue to offer the after school compensatory services and further offered to adjust the schedule to meet the Student’s schedule. (P Exh 29, p. 228).

60. Dr. Warren Henry Wheelock (“Dr. Wheelock”), a professor from the University of Missouri at Kansas City, testified concerning his testing and observations of the Student. Dr. Wheelock first tested the Student’s reading ability on September 8, 2000 and later tested him on March 1, 2002. (Tr pp. 297-298). Dr. Wheelock utilized the Silvaroli-Wheelock Classroom Reading Inventory, an inventory test he co-authored (Tr p. 305), which tested the Student’s phonetic structural analysis skills. (Tr pp. 300-301). It was Dr. Wheelock’s assessment that the Student had progressed in his reading ability from the time Dr. Wheelock first tested him through the Student’s last assessment on the Silvaroli-Wheelock Inventory. Dr. Wheelock also testified as follows:

A. He does not believe that the Original Decision was appropriate when it required a “multi-disciplinary approach” all the time for the Student. Dr. Wheelock originally recommended the Orton-Gillingham approach be used to assist the Student to learn to

decode. (Tr pp. 306-307). “Once he developed decoding skills, then [the Student] would not need [the Orton-Gillingham approach] any longer.” (Tr p. 307, Ins. 6-8).

B. Once the Student has mastered decoding of words, the emphasis of the reading instruction should turn to reading comprehension, (Tr pp. 306-307), principally through expository and narrative reading. (Tr p. 307). One procedure that could be used to move the child into expository and narrative reading would be a “reciprocal questioning approach.”¹

C. The Original Decision requires the District to use a multi-sensory approach using all the senses all of the time for two hours per day which was “way too much.” (Tr p. 310, Ins. 3-6). Even if the Student needed the instruction “desperately,” that amount of instruction would be “too much because the child cannot tolerate that . . . level of intensity with decoding. They . . . quickly get turned off to it. And then reading becomes the enemy.” (Tr p. 310, Ins 13-17).

D. The Original Decision requires the District to provide the Student with a teacher with special training and expertise in teaching a child with severe dyslexia, but there is “no such person,” in that there is “no certification that requires somebody to be that well trained.” (Tr p. 313, Ins 19-25; Tr p. 314, Ins. 1-4). Rather, teachers of learning disabled children “understand the multi-sensory approach better than do special reading teachers, because special reading teachers concentrate more on less severely disabled children. (Tr p. 314, Ins 9-15). A teacher with a Masters in reading and an LD certification would be “imminently qualified to teach” the Student. (Tr p. 315, Ins. 7-10).

E. The Student has progressed since Dr. Wheelock last saw him in 2002 and is now decoding. (Tr pp. 318-323).² Dr. Wheelock testified that the “focus” of the Student’s reading instruction at this time should be what he calls “mentor tutoring,” which

¹ Dr. Wheelock described this process as follows:

“ . . . the teacher begins to model fluent reading and might read a page or paragraph from a page to begin with and ask the student a question about what she just read. The reciprocity comes in where the student gets to read the next page or the next paragraph and gets to ask the teacher a question. And it goes back and forth that way. . . . Once the child begins to ask questions that predict outcomes of stories, it’s kind of like the hook is in.” (Tr p. 308, Ins. 6-21).

² Dr. Wheelock testified that:

Error! Main Document Only. “. . . in terms of decoding skills . . . [the Student] has achieved a level of mastery. That is, he knows the decoding skills. What he doesn’t have now is automaticity. He has to concentrate too much on decoding and what happens is that he loses sight of what he’s reading. He becomes, in essence, a word caller. He’s saying the words, but because he has to concentrate on them, he doesn’t have the fluency or automaticity, then he’s not really gaining much from comprehension.” (Tr p. 309, Ins. 19-25; p. 310, Ins. 1-2).

consisted of reading and “spot tutoring” when the Student made errors in the reading process. (Tr p. 323). Dr. Wheelock summed up this opinion by saying that “the emphasis would always be on the independent or the actual reading and stop with the decoding business.” (Tr p. 323, lns. 12-17).³

F. Dr. Wheelock would not advocate a reading program for the Student which would require phonics drill for three and one half hours per day. (Tr pp. 327-328). He further believes that restricting the Student’s teachers to one strict approach would not benefit the Student. (Tr p. 328). Rather, he believes that the teacher should use his/her experience to bring variations to the teaching which the teacher knows will work with children. (Tr p. 328).

The testimony of Dr. Wheelock constitutes an accurate assessment of the Student’s educational abilities and needs in the area of basic reading skills, reading comprehension and written language.

61. The Present Level of Educational Performance contained in the Student’s March 29, 2004 IEP (Dist. Exh 6, pp. 64-66) includes an accurate statement of the Student’s present level of educational performance as of March 29, 2004.

62. At all times relevant to the facts of this hearing, the Student’s teachers, including but not limited to Tanya Adams, Shari Hart, Rita Pospisil, Lori Russell, Charles Yaw, Bev McCormick, Patti Ruben, Molly Tanner and Janel Coulson met the requirements of the DESE with respect to education and certification and were qualified, competent and properly trained in order to provide appropriate educational services to the Student.

63. The Extended School Year Services set forth in the Student’s March 29, 2004 IEP (Dist Exh 6, p. 74) are appropriate and are reasonably calculated to provide educational benefit to the Student.

64. The Annual Measurable Goal and Benchmarks/Objectives set forth in the Student’s March 29, 2004 IEP for Spelling, (Dist Exh 6, p. 75); Basic Reading, (Dist Exh 6, p. 76); Language Arts-Written Language, (Dist Exh 6, pp. 78-79); Math, (Dist Exh 6, pp. 80-83); and, Occupational Therapy, (Dist Exh 6, pp. 84-85) are appropriate, provide the Student with a free, appropriate public education in the least restrictive environment and are reasonably calculated to provide educational benefit to the Student.

65. The Student’s Placement, types of special education services and minutes of regular and special education instruction set forth in the Student’s March 29, 2004 IEP (Dist Exh 6, p. 63) are appropriate, provide the Student with a free, appropriate public education in the least

³ Dr. Wheelock testified also that it was his opinion that the Student did not need the strict Orton-Gillingham approach. (Tr p. 325, lns. 18-25).

restrictive environment and are reasonably calculated to provide educational benefit to the Student.

66. The implementation date for the Student's March 29, 2004 IEP (Dist Exh 6) was August 19, 2004, the beginning of the Student's Seventh Grade school year. The March 29 IEP, was never implemented because the Original Decision issued on April 5, 2004, was appealed by the District on May 10, 2004 and the Injunction subsequently issued on July 10, 2004.

II. CONCLUSIONS OF LAW

67. The District is a Missouri Public School District which is organized pursuant to Missouri statutes.

68. The Student is now and has been a resident of District during all times relevant to this due process proceeding, as defined by Section 167.020 RSMo.

69. The IDEA, its regulations and the *State Plan for Part B of the Individuals With Disabilities Education Act* (2004), ("State Plan") set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District in providing special education and related services to students with disabilities.

70. The State Plan was in effect at all material times during this proceeding. The State Plan constitutes regulations of the State of Missouri which further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District, in providing special education and related services to students with disabilities.

71. The purpose of the IDEA and its regulations is: (1) "to ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs"; (2) "to ensure that the rights of children with disabilities and their parents are protected"; and, (3) "to assess and ensure the effectiveness of efforts to educate those children." 34 C.F.R. § 300.1.

72. The IDEA requires that a disabled child be provided with access to a "free appropriate public education." ("FAPE") *Board of Education of the Hendrick Hudson Central School District, Board Of Education, Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term "free appropriate public education" is defined by 34 C.F.R. § 300.8 as follows:

"...the term 'free appropriate public education' means special education and related services that--

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;

- (c) Include preschool, elementary school, or secondary school education in the State involved; and,
- (d) Are provided in conformity with an IEP that meets the requirements of §§ 300.340--300.350.”

A principal component of the definition of FAPE is that the special education and related services provided to the student with a disability, “meet the standards of the SEA” (State Educational Agency), and “the requirements of this part”. 34 C.F.R. Part 300.

73. If parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8th Cir. 1998); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998). The right to file a request for a due process hearing is also available to the Local Educational Agency (“LEA”), which in this case is the District.

74. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their particular needs. *O’Toole by O’Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 698 (10th Cir. 1998). The IDEA requires the District to provide a child with a disability with a “basic floor of opportunity. . . which [is] individually designed to provide educational benefit to the handicapped child.” *Rowley, supra.*, 102 S.Ct. 3034, 3047. In so doing the IDEA does not require that a school district “either maximize a student’s potential or provide the best possible education at public expense,” *Rowley, supra.*, 102 S.Ct. 3034, 3049; *Fort Zumwalt School District v. Clynes, supra.* 119 F.3d 607, 612; and *A.W. v. Northwest R-I School District*, 813 F.2d 158, 163-164 (8th Cir. 1987). Likewise, the IDEA does not require a school district to provide a program that will, “achieve outstanding results”, *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); that is “absolutely [the] best”, *Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6th Cir. 1998); that will provide “superior results,” *Fort Zumwalt School District v. Clynes, supra.* 119 F.3d 607, 613; or, that will provide the placement the parents prefer. *Blackmon v. School District of Springfield, R-12*, 198 F. 3d 648, (8th Cir. 1999); *E.S., supra.* 135 F.3d 566, 569. See also: *Tucker, supra.*, 136 F.3d 495, 505; and *Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education*, 938 F. 2d 712, 716-17 (7th Cir. 1991).

75. Article IX § 2(a) of the Missouri Constitution states in pertinent part that “[t]he supervision of instruction in the public schools shall be vested in a state board of education. . . .” The State Board of Education for the State of Missouri is the “State Educational Agency” (“SEA”) for the State of Missouri, as that term is defined in the IDEA, 20 U.S.C. § 1401(28).

76. During all times relevant to the Current Request, the District has considered the Student to be a “Child with a Disability,” as that term is defined by the IDEA, its Regulations and the State Plan.

77. To the extent that it is required by the facts in this case and the issues presented to the Hearing Panel, during all times relevant to the Current Request, the District's actions with respect to the Student and his Parents have met the procedural requirements of the IDEA and State Plan. To the extent that a question arises with respect to any procedural due process requirement relevant to the Current Request, there is no competent evidence on the record that any such alleged procedural inadequacy impeded the Student's right to FAPE; significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of FAPE for the Student; or, caused a deprivation of educational benefits for the Student.

78. The IDEA, 20 U.S.C. §1414(d)(4)(A) requires as follows:

“(4) Review and revision of IEP

(A) In general. The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team –

(i) *reviews the child's IEP periodically, but not less than annually* to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address--

(1) any lack of expected progress toward the annual goals and in the general curriculum, where appropriate;

(2) the results of any reevaluation conducted under this section;

(3) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B) of this section;

(4) the child's anticipated needs; or

(5) other matters.” [emphasis added].

79. The Regulations of the IDEA, 34 C.F.R. §300.343(c) require as follows:

“(c) Review and revision of IEPs. Each public agency shall ensure that the IEP team –

(1) *Reviews the child's IEP periodically, but not less than annually*, to determine whether the annual goals for the child are being achieved; and,

(2) Revises the IEP as appropriate to address –

(i) Any lack of expected progress toward the annual goals described in §300.347(a), and in the general curriculum, if appropriate;

- (ii) The results of any reevaluation conducted under §300.536;
- (iii) Information about the child provided to, or by, the parents, as described in §300.533(a)(1);
- (iv) The child's anticipated needs; or,
- (v) Other matters." [emphasis added]

80. The Regulations of the IDEA, Appendix A to Part 300 – Notice of Interpretation, ¶ 20, state as follows:

“ 20. How frequently must a public agency conduct meetings to review, and if appropriate, revise the IEP for each child with a disability?

A public agency must initiate and conduct meetings periodically, but at least once every twelve months, to review each child's IEP, in order to determine whether the annual goals for the child are being achieved, and to revise the IEP, as appropriate, to address: (a) Any lack of expected progress toward the annual goals and in the general curriculum, if appropriate; (b) the results of any reevaluation; (c) information about the child provided to, or by, the parents; (d) the child's anticipated needs; or (e) other matters. (§300.343(c)). . . .” [emphasis added].

81. The State Plan, page 31, sets forth the following requirements regarding IEPs:

“When IEPs Must be in Effect (34 CFR 300.342)

At the beginning of the school year, each public agency shall have an IEP in effect for each child with a disability within its jurisdiction who has been determined eligible to receive services under IDEA, Part B. . . .

Review and Revision of IEPs

Each public agency shall ensure that the IEP team *reviews the child's IEP periodically, but not less than annually*, to determine whether the annual goals for the child are being achieved. The IEP team must also review and, as appropriate, revise the IEP to address . . .” [emphasis added].

82. The Student's school year 2003-2004 IEP was developed by his IEP team on April 3, 2003. As a matter of law, the District was required to hold an annual IEP meeting with the Student's IEP team on or before April 3, 2004, to review the Student's IEP and determine whether the annual goals for the Student were being achieved. In this case, the District convened the Student's IEP Team on March 29, 2004 and reviewed and revised the Student's IEP. The District's actions in this regard were entirely consistent with the IDEA, 20 U.S.C. §1414(d)(4)(A); the Regulations of the IDEA, 34 C.F.R. §300.343(c); the Regulations of the IDEA, Appendix A to Part 300 – Notice of Interpretation, ¶ 20; and the State Plan, page 31.

83. The IDEA Regulations, 34 C.F.R. §300.345 requires that a school district must take steps to ensure that one or both parents of a child with a disability attend each IEP meeting which is called to discuss the child. That Regulation states:

“(a) *Public agency responsibility – general.* Each public agency shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including –

- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and,
- (2) Scheduling the meeting at a mutually agreed on time and place.

(b) *Information provided to parents.*

- (1) The notice required under paragraph (a)(1) of this section must –
 - (i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and,
 - (ii) Inform the parents of the provisions in §300.344(a)(6) and (c) (relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the child. . .”

84. The IDEA Regulations, 34 C.F.R. §300.345(d) provide the following concerning the ability of a school district to conduct an IEP meeting without the attendance of a parent of the child with a disability:

“(d) *Conducting an IEP meeting without a parent in attendance.* A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place, such as –

- (1) Detailed records of telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parents and any responses received; and,
- (3) Detailed records of visits made to the parent’s home or place of employment and the results of those visits.

85. The State Plan, page 33, provides the following concerning the ability of a school district to conduct an IEP meeting without the attendance of a parent of the child with a disability:

“Conducting an IEP Meeting without a Parent in Attendance. A meeting may be conducted without a parent in attendance if the public agency is unable to

convince the parents that they should attend. In this case the public agency must have a record at least two (2) attempts to arrange a mutually agreed on time and place, such as:

- A. detailed records of telephone calls made or attempted and the results of those calls;
- B. copies of correspondence sent to the parents and any responses received; and,
- C. detailed records of visits made to the parent's home or place of employment and the results of those visits."

86. Prior to the March 29, 2004 IEP meeting, the District, through Special Education Director LeeAnn Rick, had a telephone conference with the Student's Mother during which they agreed to the date and time for the IEP meeting. Following that conversation, Ms. Rick sent a completed Notification of Meeting form to the Parent on March 5, 2004, which was received by the Parent on March 9, 2004. (P Exh 2). On March 24, 2004 Ms. Rick, left a voice mail message on the Parent's home telephone which again notified the Parent of the date and time of the IEP meeting. (Tr p 19). This message was followed up on March 24, 2004 with a letter and a second completed Notification of Meeting form. (P Exh 5). The actions of the District specified in this paragraph, met the requirements of the IDEA Regulations, 34 C.F.R. §300.345(a), (b) and (d) and the State Plan. The documentary evidence submitted at the hearing by the District to show its efforts to obtain the attendance of the Parent at the March 29, 2004, met the requirements of the IDEA Regulations, 34 C.F.R. §300.345(d) and the State Plan and allowed the District to conduct the March 29, 2004 IEP meeting without the attendance of the Parent.

87. The composition of the Student's IEP Team which developed the Student's March 29, 2004 IEP was appropriate and met the procedural and substantive requirements of the IDEA, its Regulations, including but not limited to 34 C.F.R. § 300.344, and the State Plan (including but not limited to pages 31-34). To the extent that a question arises with respect to the procedural appropriateness of the composition of the Student's IEP Team which developed the Student's March 29, 2004 IEP, there is no competent evidence on the record that any alleged procedural inadequacy impeded the Student's right to FAPE; significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of FAPE for the Student; or, caused a deprivation of educational benefits for the Student.

88. The Present Level of Educational Performance contained in the Student's March 29, 2004 IEP (Dist. Exh 6, pp. 64-66) includes an accurate statement of the Student's present level of educational performance as of March 29, 2004. The Present Level of Educational Performance meets the procedural and substantive requirements of the IDEA, its regulations and the State Plan. To the extent that a question arises with respect to the procedural appropriateness of the Present Level of Educational Performance set forth in the Student's March 29, 2004 IEP, there is no competent evidence on the record that any alleged procedural inadequacy impeded the Student's right to FAPE; significantly impeded the Parents' opportunity to participate in the

decision making process regarding the provision of FAPE for the Student; or, caused a deprivation of educational benefits for the Student.

89. The Extended School Year Services set forth in the Student's March 29, 2004 IEP (Dist Exh 6, p. 74) are appropriate and are reasonably calculated to provide educational benefit to the Student. The Extended School Year Services meet the procedural and substantive requirements of the IDEA, its regulations and the State Plan.

90. The Annual Measurable Goal and Benchmarks/Objectives for Spelling, Basic Reading, Language Arts-Written Language, Math and Occupational Therapy set forth in the Student's March 29, 2004 IEP (Dist Exh 6, pp. 75-85) are appropriate and are reasonably calculated to provide educational benefit to the Student. These Annual Measurable Goals and Benchmarks/Objectives meet the procedural and substantive requirements of the IDEA, its regulations and the State Plan.

91. The Student's Placement, types of special education services and minutes of regular and special education instruction set forth in the Student's March 29, 2004 IEP (Dist Exh 6, p. 63) are appropriate, provide the Student with a free, appropriate public education in the least restrictive environment and are reasonably calculated to provide educational benefit to the Student. The Student's Placement, types of special education services and minutes of regular and special education instruction meet the procedural and substantive requirements of the IDEA, its regulations and the State Plan.

92. The Student's teachers, including but not limited to Tanya Adams, Shari Hart, Rita Pospisil, Lori Russell, Charles Yaw, Bev McCormick, Patti Ruben, Molly Tanner and Janel Coulson were properly trained, qualified and competent to provide appropriate educational services to the Student. Each of the Student's teachers met the requirements of the IDEA, its regulations and the State Plan with respect to their training, qualifications and competency.

93. The Student's March 29, 2004 IEP (Dist Exh 6) was appropriate, was reasonably calculated to provide the Student with a free, appropriate public education in the least restrictive environment and was reasonably calculated to provide educational benefit to the Student. The Student's March 29, 2004 IEP (Dist Exh 6) meets the procedural and substantive requirements of the IDEA, its regulations and the State Plan.

III. DECISION

Issue No. 1: Whether the IEP developed for the Student on or about March 29, 2004, offers the Student a free, appropriate public education in the least restrictive environment and is reasonably calculated to provide educational benefit to the Student.

Decision on Issue No. 1:

The Student in this case has been educationally diagnosed as being Learning Disabled in the areas of Basic Reading Skills, Reading Comprehension, Math Calculation and Written Language. In April, 2003, toward the end of the Student's Fifth Grade year, an IEP was developed to provide him with special educational services during school year 2003-04, his Sixth Grade year. Being dissatisfied with the program of special education and related services provided by the District, the Parent filed the original request for due process. The April, 2003 IEP became the stay-put IEP for the Student. Thus began the legal odyssey in which the parties find themselves today.

The matter before this Hearing Panel is the second due process proceeding between the parties. The original due process hearing resulted in a Hearing Panel decision, issued on April 5, 2004. Prior to the issuance of that decision, on March 29, 2004, the District convened an annual IEP meeting to review and revise the Student's IEP. The Parent did not attend the IEP meeting, but received appropriate notice as required by the IDEA and State Plan. At that meeting, the Student's IEP team developed the March 29, 2004 IEP, which is the subject of the issues before this due process panel.

Approximately one week later, on April 5, 2004, the first Hearing Panel issued its decision. That decision found that the District:

- A. Violated the IDEA by failing to reevaluate the Student during his fourth grade year or at the beginning of his fifth grade year to determine whether he had a learning disability in math.
- B. Failed to include an accurate statement of the Student's present levels of educational performance in his April, 2002 IEP.
- C. Failed to provide the Student with FAPE by failing to include appropriate goals and objectives in the area of math on the Student IEP for the fifth grade.
- D. Failed to provide the Student with special education services in math until the beginning of his sixth grade year.
- E. Failed to provide appropriate special education services to the Student in the area of reading during his fourth, fifth and part of his sixth grade years.

A majority of the first Hearing Panel issued an Order which required the District to: (a) provide compensatory education services for one year of special education in math; (b) amend the Student's IEP to incorporate reading services that include a multi-disciplinary approach that utilizes: all the sensory modalities all the time, a structured, sequential teaching approach, to teach the Student the structure of the English language, at least one hour per day of one-on-one instruction in decoding/phonics and a teacher with special training and expertise in teaching a

child with severe dyslexia; and, (c) provide compensatory education services in reading for at least two hours each day for a duration of three years.

The District appealed the Hearing Panel's decision to the United States District Court for the Western District of Missouri. In July, 2003, during the course of this appeal, the Court issued an Order which granted the Parent's request for a preliminary injunction. The Order found that the Hearing Panel's April 5, 2004, decision constituted an "agreement" between the State of Missouri and the Student. The injunction enjoined the District from violating the "agreement" and required the District to implement the educational placement described in the Hearing Panel's Decision.

On July 23, 2004, the District requested the current due process hearing to determine whether the March 29, 2004 IEP offered the Student a free, appropriate public education in the least restrictive environment and is reasonably calculated to provide educational benefit to the Student.

Throughout the processing of this due process request, the parties have been embroiled in a battle-royal which appeared at times to lose focus on the rather limited issue that this Hearing Panel was empowered to hear. Much time and effort has been spent by both sides, believing that their positions were righteous, to either gain a legal advantage or force an educational preference on the opposing party. This proceeding is not a civil case which has a dollars and cents solution. Nor is it a test of wills – a determination of who will lose face or gain favor. Rather, this due process proceeding is merely a part of the bigger dispute between the Student's Parent and the District which jeopardizes the education and future of a young man. Both parties want to do right by the Student, but fail to agree on the appropriate solution. Accordingly, two DESE hearing panels and a Federal Court have been asked to intercede to try to craft a solution to what appears to be a dysfunctional relationship that exists between the Parent and District.

It is the determination of a majority of this Hearing Panel that the Student's March 29, 2004, IEP offers the Student a free, appropriate public education in the least restrictive environment and is reasonably calculated to provide educational benefit to the Student. The reasons for that decision are set forth above in the Findings of Fact and Conclusions of Law. In making this decision, this Hearing Panel has not been asked to address, and accordingly has not addressed, whether the compensatory educational services ordered by the first due process panel,⁴ and enforced by the Court's injunction, are appropriate or should be discontinued. The majority of this Hearing Panel observes, however, that the inclusion of these compensatory services, within the confines of the hours of the school day, appear to have interfered with the Student's ability to participate in regular education classes with his peers, such as physical

⁴ The first due process panel ordered that the District provide compensatory education services math for one year and compensatory education services in reading for at least two hours each day for a duration of three years.

education, the “wheel” classes and, most importantly, the full English curriculum offered in the District’s Junior High School.

Since the majority of this Hearing Panel has found that the Student’s March 29, 2004 IEP offers the Student FAPE, it should be obvious that the Hearing Panel’s majority prefers a more general approach to the drafting of the Student’s Annual Measurable Goals and Benchmarks/Objectives for Spelling, Basic Reading, Language Arts-Written Language, Math and Occupational Therapy. Such an approach is diametrically opposed to the approach ordered by the majority of the first due process panel that required the District to provide reading services to the Student:

“ . . . that include a multi-disciplinary approach that utilizes: all the sensory modalities all the time, a structured, sequential teaching approach, to teach the Student the structure of the English language, at least one hour per day of one-on-one instruction in decoding/phonics. . . ”

The precise specification of this educational methodology by the first panel’s majority has only served to handcuff the Student’s teachers into providing educational programming that the Student has educationally outgrown or that so frustrates the Student that he is turned off by their efforts to provide him with the dictated educational program. The majority of this Hearing Panel agrees with Dr. Warren Henry Wheelock who testified that it was his opinion that restricting the Student’s teachers to one strict approach would not benefit the Student. Rather, he testified, the Student’s teachers should be allowed to use their experience to bring variations to the teaching process which each teacher knows would work with the Student.

This opinion represents a majority opinion of the Hearing Panel (Chairperson Ellis and Panel Member Smith). Panel Member McClure files a separate opinion which is attached.

Issue No. 2: Whether the stay-put, which resulted from the Student’s 2003 due process request, precluded the District from developing the March 29, 2004 IEP for the Student.

Decision on Issue No. 2:

The Student’s IEP which was prepared for school year 2003-04 was developed by his IEP team on April 3, 2003. The Regulations of the IDEA, 34 C.F.R. §300.343(c) require as follows:

- “(c) Review and revision of IEPs. Each public agency shall ensure that the IEP team –
- (1) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and,
 - (2) Revises the IEP as appropriate to address –

- (i) Any lack of expected progress toward the annual goals described in §300.347(a), and in the general curriculum, if appropriate;
- (ii) The results of any reevaluation conducted under §300.536;
- (iii) Information about the child provided to, or by, the parents, as described in §300.533(a)(1);
- (iv) The child's anticipated needs; or,
- (v) Other matters."

It is the opinion of a majority of this Hearing Panel that, as a matter of law, the District was required to hold an annual IEP meeting with the Student's IEP team on or before April 3, 2004, to review the Student's IEP, determine whether the annual goals for the Student were being achieved and revise the IEP as appropriate to address such things as the Student's anticipated needs.

Since the Student was moving from the District's elementary curriculum to the junior high curriculum, it is certainly reasonable to expect that adjustments in the IEP would be needed. This is especially true where the District's junior high curriculum has an educational week that is two hundred twenty-five (225) minutes shorter than the District's elementary educational week. It is also conceivable that the parties could have reached an agreement on a new IEP that would provide an appropriate educational program for the Student. If this had occurred, it certainly would have eliminated the need for the additional litigation which occurred here.

In this case, the District convened the Student's IEP Team on March 29, 2004 and reviewed and revised the Student's IEP. The District's actions in this regard were entirely consistent with the IDEA, 20 U.S.C. §1414(d)(4)(A); the Regulations of the IDEA, 34 C.F.R. §300.343(c); the Regulations of the IDEA, Appendix A to Part 300 – Notice of Interpretation, ¶20; and the State Plan, page 31.

This opinion represents a majority opinion of the Hearing Panel (Chairperson Ellis and Panel Member Smith). Panel Member McClure files a separate opinion which is attached.

IV. ORDER

A majority of the Hearing Panel finds that:

1. The IEP developed for the Student on or about March 29, 2004, offered the Student a free, appropriate public education in the least restrictive environment and is reasonably calculated to provide educational benefit to the Student.
2. The stay-put, which resulted from the Student's 2003 due process request, did not preclude the District from developing the March 29, 2004 IEP for the Student.

V. APPEAL PROCEDURE

PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision pursuant to Section 162.962 RSMo. Specifically, you may request review by filing a petition in a state or federal court of competent jurisdiction within forty-five days after the receipt of this final decision. Your right to appeal this final decision is also set forth in the Regulations to the IDEA, 34 C.F.R. §300.512, and in the Procedural Safeguards which were provided to you at the beginning of this matter.

Ransom A Ellis, III
Hearing Chairperson

Dated: March ____, 2005

Dr. Patty Smith
Hearing Panel Member

Dated: March ____, 2005

Separate Opinion of Panel Member Marilyn McClure

It is important for this panel to examine the issues in the order of their occurrence at the school.

First, issue two: “Whether the stay-put, which resulted from the Student’s 2003 due process request, precluded the District from developing the March 29, 2004, IEP for the student.”

The March 29 2004 IEP meeting was premature; it was held only days before a federal decision. Stay-put was in effect at that time based on the April 2003 IEP.

IDEA regulations indicate this annual mandatory review of the child’s educational plan is “...to revise the IEP as appropriate” With stay-put in effect, it would not have been appropriate absent any mutual agreement between the parties. “Stay-put” does not indicate that it can be superseded by a party, unless the parties mutually agree. No mutual agreement existed on March 29, 2004 in relation to the development of a new IEP for the student.

Development of a new IEP during pending litigation of prior IEPs causes layers of new dispute. Interestingly, this action was initiated subsequent to decisions of a previous panel and an injunction from a federal court.

The district did not ask the parent for a waiver of the time lines pending the decision by the federal court. That decision came out April 5, 2004.

Several more weeks of that school year were available to hold an IEP meeting where the team, with the federal decision in hand, could have then properly planned for the students upcoming seventh grade year.

The parent did not attend the March 29, 2004 IEP meeting because she understood that “stay put” was in effect and her lawyer told her not to go.

Second, issue one: “Whether the IEP developed for the Student on or about March 29, 2004, offers the Student a free, appropriate public education in the least restrictive environment and is reasonable calculated to provide educational benefit to the student.”

This March 29, 2004, IEP is moot since it was developed without the benefit of the decision from the federal court. However, its contents are worthy talking points for a future IEP meeting.

Recognizing that proper notice was provided to the parent in preparation for this meeting, the meeting was of no value since it was an attempt to change the student’s programming

without the benefit of a forthcoming federal decision and without any offer to mutually agree with the parent of any changes that the school district believed were needed.

Marilyn McClure
Hearing Panel Member

Dated: March ____, 2005

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon each party to this action, to-wit:

Ms. Kayden B. Howard
Ms. Elizabeth C. Lawrence
Shook, Hardy & Bacon, L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108-2613

Ms. Marilyn McClure
P.O. Box 16
Strasburg, MO 64090

Pam Williams
Special Education Legal Services
Department of Elementary and
Secondary Education
Post Office Box 480
Jefferson City, MO 65102-0480

Ms. Teri B. Goldman
36 Four Seasons Center, #337
Chesterfield, MO 63017

Dr. Patty Smith
Director of Special Services
Liberty School District
650 Conistor
Liberty, MO 64068

by depositing same in the United States mail at Springfield, Missouri, postage prepaid, duly addressed to said parties on this _____ day of March, 2005.

Ransom A Ellis, III
Hearing Chairperson